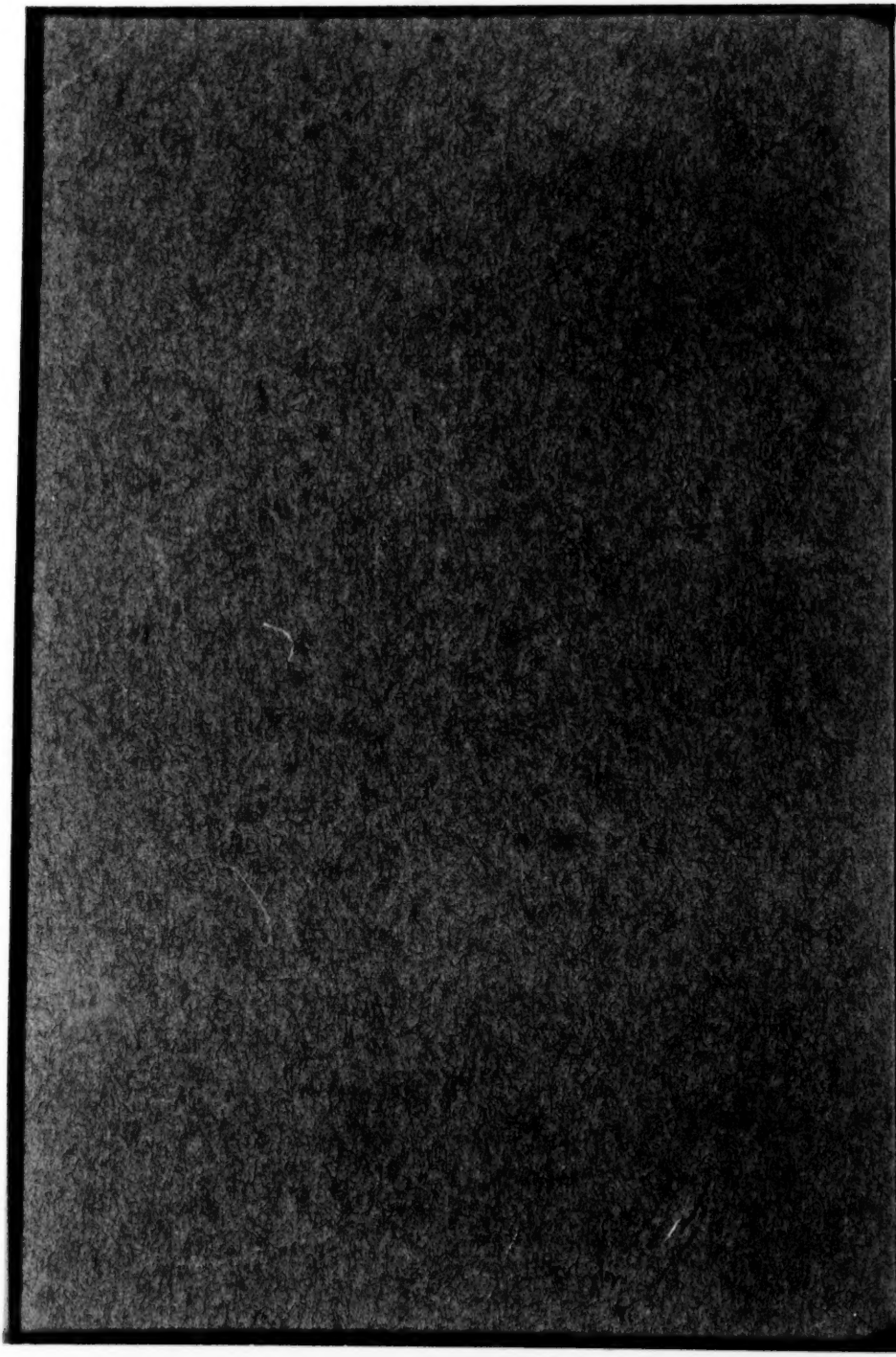


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448144—42

# In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 919

THE FIFTH AVENUE BANK OF NEW YORK, AS TRUSTEE, PETITIONER

*v.*

THE UNITED STATES

*ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINION BELOW

The opinion of the Court of Claims (R. 9–14) is reported in 41 F. Supp. 428.

### JURISDICTION

The judgment of the Court of Claims was entered on November 3, 1941 (R. 14). The petition for a writ of certiorari was filed February 3, 1942 (R. 14). The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

## QUESTION PRESENTED

After the grantor's death the trustee of a revocable *inter vivos* trust sold certain capital assets which it had acquired prior to the grantor's death. In determining the portion of the gain to be taxed under Section 117 (a) of the Revenue Act of 1934, is the trustee to be treated as having "held" these assets from the date on which the trust acquired them or from the date of the grantor's death?

## STATUTE INVOLVED

Section 117 (a) of the Revenue Act of 1934 provides:

> SEC. 117. CAPITAL GAINS AND LOSSES.
>
> (a) *General Rule.*—In the case of a taxpayer, other than a corporation, only the following percentages of the gain or loss recognized upon the sale or exchange of a capital asset shall be taken into account in computing net income:
>
> 100 per centum if the capital asset has been held for not more than 1 year;
>
> 80 per centum if the capital asset has been held for more than 1 year but not for more than 2 years;
>
> 60 per centum if the capital asset has been held for more than 2 years but not for more than 5 years;
>
> 40 per centum if the capital asset has been held for more than 5 years but not for more than 10 years;
>
> 30 per centum if the capital asset has been held for more than 10 years;
>
> * * * * *

Other pertinent portions of the applicable statute are set forth in the Appendix, *infra*, pp. 8–10.

## STATEMENT

The special findings of the Court of Claims (R. 6–8) may be summarized as follows:

On October 28, 1926, Henry Herman Westinghouse transferred certain property to the petitioner and himself as co-trustees to receive, manage, and invest the trust property, to pay the income to the grantor during his life and after his death to his widow for her life and then to distribute the corpus as directed in the trust agreement. The grantor reserved the right, while he lived, to amend or revoke the trust by an instrument in writing. He died on November 18, 1933, without having exercised the power of revocation. (R. 6.)

On October 11, 1927, and November 1, 1929, the grantor transferred certain securities to the trust. Between August 12 and August 27, 1932, the trust purchased certain other securities. During 1934 the petitioner, as trustee, sold both lots of securities.[1] (R. 6–7.)

In an income tax return for 1934 the petitioner took as the basis for determining the gain or loss upon the sale of those securities the value of the securities upon the date of the grantor's death, November 18, 1933. For purposes of determining

[1] At the same time the trustee sold certain other securities acquired by it after the grantor's death. But, since there is no dispute as to the period for which they were "held", this fact may be ignored for present purposes.

the percentage of the gain or loss to be taxed under Section 117 of the Revenue Act of 1934, the petitioner computed the period for which it had "held" these securities as also running from the date of the grantor's death (R. 8). Later, however, the petitioner filed a claim for refund upon the ground that the holding period should have been computed not from the date of grantor's death but from the date of the trustee's acquisition of the securities. The claim for refund was rejected by the Commissioner of Internal Revenue on January 25, 1938 (R. 7–8).

Upon the foregoing facts, the Court of Claims ruled that the holding period for the purpose of computing the capital gain ran from the date of death of the grantor and gave judgment for the United States (R. 8–9).

## ARGUMENT

1. Throughout the Revenue Acts runs the concept that the creation of a revocable trust results in so insubstantial and formal a change of ownership as to be ignored for tax purposes, especially where, as here, the grantor also reserves a life estate. The income is taxed as income of the grantor. *E. g.* Revenue Act of 1934, Section 166. If the trustee sells capital assets acquired from the grantor, the basis taken for determining gain or loss is the same as it would have been in the hands of the grantor and the property is treated as having been "held" not for the period during which

title was in the trustee and the trustee had possession of the property, but for the entire period during which either the grantor or the trustee had the property. Sections 113 (a) (3), 117 (c) (2); cf. *Helvering* v. *New York Trust Co.*, 292 U. S. 455. Upon death of the grantor the corpus of the trust is included in his taxable estate. Revenue Act of 1926, Secton 302 (d). And after the death of the grantor, the value of the property at the death is taken as the basis of determining gain or loss upon sales by the trustee. Section 113 (a) (5). These provisions uniformly bear witness to the tax concept stated by the Conference Committee in 1928 when Section 113 (a) (5) was first put into the Revenue Acts (H. Conf. Rep. 1882, 70th Cong., 1st Sess., p. 15 (1939–1 Cum. Bull. (Part 2) 444):

> Thus property acquired by virtue of revocable trusts of the kind described is treated, for all practical purposes, the same as though it had been transmitted by the grantor by will at his death.

Section 117 (a) must be read in this statutory background of interrelated provisions. Petitioner's construction attributes to Congress a curiously capricious inconsistency; there could be no reason for treating either the property conveyed to the trust by the grantor or the property purchased by the trustee during the grantor's life as property "held" by the trustee from the date of acquisition for purposes of computing the holding period and as property of the grantor until his death for every

other tax purpose. On the other hand, the natural meaning of "held" is done no violence by reading it to require more than the holding of a bare legal title subject to the grantor's complete power of revocation; and harmony is brought to the statute by treating such property as "held" by the grantor until his death for this as well as all other purposes. Under these circumstances the Court of Claims was plainly right in preferring the latter interpretation. Cf. *Helvering* v. *New York Co., supra.*

2. The decision of the court below is not in conflict with the decisions of this Court in *McFeely* v. *Commissioner,* 296 U. S. 102, and *Helvering* v. *Gambrill,* 313 U. S. 11. In the *McFeely* case the Court held that under the Revenue Act of 1928 securities acquired by a residuary legatee were "held" by him from the decedent's death regardless of the fact that Section 113 (a) (5) declared that the basis for determining gain or loss should be the value at the date of distribution. In the *Gambrill* case a remainderman had received securities on the termination of a testamentary trust; the Court held that in the case of securities which had belonged to the decedent the holding period began with the date of the death and in the case of securities purchased by the trustees the holding period began with the date of the purchase. Although these decisions show that the date on which the holding period begins does not necessarily coincide with the date as of which the basis for calculating gain or loss is determined, they have no tendency to show that in

enacting Section 117 (a) Congress intended to depart from its general practice of treating property held in a revocable trust as the property of the grantor until his death and thereafter as the property of the beneficiaries. On the contrary, the *McFeely* and *Gambrill* cases destroy the very premise upon which petitioner bases its argument for they show respectively that neither legal title [2] nor possession and a power of management is determinative of who "holds" the property.

3. Although, as petitioner points out (Pet. 6–7), there are a large number of revocable trusts, which might be affected by the question here presented, it does not appear to have assumed any importance for, so far as we can discover, no other trustee has litigated the question.

## CONCLUSION

There is no conflict of decisions and no question of general importance. The decision of the court below is correct and the petition should be denied.

Respectfully submitted,

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MARCH 1942.

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[2] See 296 U. S. 102, 107–108.